

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 02-20484 DV
	)	
TORRICK LYLES,	)	
	)	
Defendant.	)	

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REPORT AND RECOMMENDATION  
ON DEFENDANT'S MOTION TO DISMISS SUPERCEDING INDICTMENT  
ON GROUNDS OF VINDICTIVE PROSECUTION

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Before the court is a motion filed May 19, 2003, by the defendant, Torrick Lyles, to dismiss the government's superceding indictment on grounds of vindictive prosecution. The motion was referred to the United States Magistrate Judge for a report and recommendation. For the following reasons, it is recommended that Lyles' motion be denied.

Lyles originally was indicted in this cause on December 10, 2002, and charged with possession with intent to distribute a controlled substance. Two unrelated indictments of Lyles also were pending at the time. The instant indictment was based on evidence, including controlled substances and a firearm, discovered in September of 2002 during a search of a residence pursuant to warrant.

The government and Lyles entered into plea negotiations

concerning all three indictments. In the course of those negotiations, the government indicated to Lyles that if a plea agreement could not be reached the government would seek a superceding indictment in the instant case adding a count of violation of 18 U.S.C. 924(c), use or possession of a firearm in relation to a drug crime. The parties could not agree, and the superceding indictment accordingly issued. The case is still in its pretrial phase.

Lyles argues that the superceding indictment is the result of vindictive prosecution and made without due process of law. He avers that the evidence underlying the superceding indictment was known to the government at the time of the original indictment and that the superceding indictment was sought solely to punish Lyles for asserting his right to a trial. (Def.'s Mot. at 5.)

To establish vindictive prosecution in the Sixth Circuit, a defendant must show:

(1) the exercise of a protected right; (2) the prosecutor's 'stake' in the exercise of that right; (3) the unreasonableness of the prosecutor's conduct, and presumably (4) that the prosecution was initiated with the intent to punish the plaintiff for the exercise of the protected right.

*National Eng'g & Contracting Co. v. Herman*, 181 F.3d 715, 723 (6th Cir. 1999) (quoting *Futernick v. Sumpter Township*, 78 F.3d 1051, 1056 n. 7 (6th Cir. 1996)). "The Due Process Clause is not offended by all possibilities of increased punishment . . . but only by those that pose a realistic likelihood of 'vindictiveness'" in the

prosecutor's action. *Blackledge v. Perry*, 417 U.S. 21, 27 (1974) (finding vindictive prosecution and due process violation in post-trial prosecutorial activity); *Bordenkircher v. Hayes*, 434 U.S. 357, 362 (1977) (distinguishing pre-trial prosecutorial activity from post-trial prosecutorial activity and finding no due process violation); *United States v. Andrews*, 633 F.2d 449, 453-454 (6th Cir. 1980) (applying *Blackledge* and *Bordenkircher* and limiting *Bordenkircher* to plea-bargaining situations). Once the defendant shows a realistic likelihood of vindictiveness, the burden shifts to the government to disprove vindictiveness. *Andrews*, 633 F.2d at 456.

In the case of a charging decision made during plea negotiations, however, the motive may actually be retaliatory without offending due process. This scenario is governed by *Bordenkircher v. Hayes*, 434 U.S. 357, 362 (1977). In *Bordenkircher*, the defendant, Paul Hayes, faced an indictment under a forgery statute. During plea negotiations, the prosecutor expressly indicated that if Hayes did not plead guilty to the forgery charge, the government would also charge Hayes under a habitual offender statute. Hayes refused to plead guilty; the additional indictment was brought; and Hayes was convicted of both charges. It was undisputed that "the recidivist charge was fully justified by the evidence, that the prosecutor was in possession of this evidence at the time of the original indictment, and that

Hayes' refusal to plead guilty to the original charge was what led to his indictment under the habitual criminal statute." *Bordenkircher*, 434 U.S. at 359.

The Supreme Court held that "in the 'give-and-take' of plea bargaining, there is no . . . element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." *Id.* at 363. Provided the defendant properly was chargeable with the crime for which the indictment issued, the Court declared, the burden of proof will not shift merely because the prosecution based its charging decision on the defendant's refusal to plead guilty. *Id.* at 364; *Andrews*, 633 F.2d at 456-57.

The Sixth Circuit recently applied these rules in a case similar to the one at bar. In *United States v. Walls*, 293 F.3d 959 (6th Cir. 2002), the defendant at issue, Stephens, initially was indicted along with other defendants for the possession and manufacture of methamphetamine. In a superceding indictment returned after a co-defendant agreed to cooperate with law enforcement officials, Stephens also was charged with carrying a firearm in relation to a drug trafficking offense. The firearm had been discovered during an apparently lawful search of Stephens' car and was known at the time of the first indictment. Stephens protested that the superceding indictment, "coupled with the decision not to charge [the cooperating co-defendant] with a firearm offense . . . [was] a vindictive decision to punish his

assertion of his right to trial and refusal to plead guilty." *Walls*, 293 F.3d at 970. The Sixth Circuit held that "[w]hen the pretrial addition of more serious charges results merely from the failure of the plea bargaining process, it is not vindictive prosecution." *Id.* (citing *United States v. Suarez*, 263 F.3d 468 (6th Cir. 2002), *United States v. Wade*, 266 F.3d 574 (6th Cir. 2001), and *United States v. Wells*, 211 F.3d 988 (6th Cir. 2000) (all finding superceding indictments not vindictive)).

In this case, as in *Bordenkircher* and *Walls*, it is undisputed that the new charge was justified by existing evidence; that the prosecutor knew of the evidence at the time of the original indictment; and that the breakdown of plea bargaining led to the new charge. It is submitted that these facts place the case squarely within *Bordenkircher* and its progeny. Although the decision to indict Lyles under 18 U.S.C. 924(c) may have been retaliatory, it was made during plea bargaining and Lyles has made no showing that he was not free to reject the proffered bargain. Accordingly, it is submitted that Lyles has not met the threshold showing for a due process violation and that his motion should therefore be denied.

Respectfully submitted this 25th day of June, 2003.

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DIANE K. VESCOVO  
UNITED STATES MAGISTRATE JUDGE